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We have attached the following legal documents:

1. A "Statement of Interest" that the Department of Justice submitted on our behalf in UAPD v. Schwarzenegger.
2. A "Declaration" that our San Francisco Regional Commissioner, Peter Spencer, submitted in SEIU v. Schwarzenegger. Mr. Spencer also submitted this declaration in UAPD v. Schwarzenegger.

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11
12 SUPERIOR COURT OF CALIFORNIA

13 COUNTY OF ALAMEDA

14 UNION OF AMERICAN PHYSICIANS
15 AND DENTISTS,

16 Petitioner/Plaintiff,

17
18 v.19 ARNOLD SCHWARZENEGGER, Governor of
20 the State of California, et al.,

21 Defendants/Respondents.

CASE NO. RG09456684

STATEMENT OF INTEREST OF
UNITED STATESBY FAXJudge: Hon. Frank Roesch
Dept: 3122
23
24 INTRODUCTION25 Pursuant to 28 U.S.C. § 517, the United States submits this Statement of Interest in the
26 above matter. In so doing, it is not appearing on behalf of any party, nor does it seek to
27 intervene. Rather, it seeks to demonstrate that the United States is statutorily authorized to file
28 this Statement as a nonparty; describe its interests in this case; and explain how these interests

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1 affect the legal issues raised by Plaintiff's petition. As discussed below, the action taken by the
2 State of California that led to this litigation—namely, the furloughing of State employees who
3 perform functions that are essentially federal in nature and that are funded with federal money—
4 is not only inconsistent with California's federal legal obligations but unsupported by the
5 articulated reason for the furloughs in the first place. The Court should therefore rule in favor of
6 Plaintiff on the question of the legitimacy of the furloughs.

7 STATEMENT OF THE CASE

8 In this action, the Union of American Physicians & Dentists (UAPD) challenges
9 Executive Order S-16-08 ("the Order"), issued by Governor Arnold Schwarzenegger on
10 December 19, 2008, which mandates furloughs of two days a month for all California state
11 employees until June 30, 2010.¹ The Order applies to all represented state employees and
12 supervisors, "regardless of funding sources," even though the reason cited in the Order for
13 implementing the furloughs is a fiscal crisis arising from a deficit in the state General Fund.
14 UAPD, which represents state-employed non-management physicians and dentists, seeks a writ
15 of mandate against the Governor and various state agencies on behalf of UAPD members who
16 work for defendant agencies and who are paid from sources other than the General Fund.

17 This case is of particular interest to the United States because it involves state employees
18 who perform an essentially *federal* function. Specifically, UAPD includes employees of the
19 California Department of Social Services (DSS) who evaluate Social Security Disability
20 Insurance (SSDI) and Supplemental Security Income (SSI) claims (collectively, Disability
21 Determination Services Division, or DDSD, employees). As explained in greater detail herein,
22 the salaries of these employees are fully federally funded under the Social Security Act ("Act"),
23 *see* 42 U.S.C. § 421, and their functions are defined by federal regulations. The United States
24 contends that the furloughs, which have already had—and continue to have—a significant
25 adverse impact on the adjudication of disability claims, contravene California's obligations
26 under federal law.

27
28 ¹ The Governor subsequently issued another Executive Order (S-13-09), effective July 1, 2009,
expanding the furloughs to three days per month.

ARGUMENT**I. The United States Has Authority to File a Statement of Interest as a Nonparty to This Action.**

28 U.S.C. § 517 authorizes the Attorney General to send any officer of the United States Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Under this statute, it is not required that the United States intervene in order to represent its interests. Indeed, it is common practice for the United States to choose *not* to become a party but to file a Statement of Interest at the trial level in both federal and state cases, including cases in California state court. *See, e.g.,* Exhibits A, B [California trial court orders reflecting statements of interest filed by U.S.]; *see also Samuel C. Johnson 1988 Trust v. Bayfield Cry*, 2009 WL 1850646 (W.D. Wis. June 26, 2009) ("Although the United States has not moved to intervene... its stake in the outcome of this case is significant...Accordingly, I will treat its arguments as those of an *amici curiae*."); *Weixum v. Xilai*, 568 F. Supp. 2d 35, 35 (D. D.C. 2008) ("Before the Court are a Suggestion of Immunity and Statement of Interest filed by the United States, who is not a party in this matter"); *Northern Mich. Hospitals, Inc. v. Health Net Fed. Svcs, LLC*, 2008 WL 2233964, *5 (D. Del. May 30, 2008) (holding U.S. was neither real party in interest nor a necessary and indispensable party, and noting that in its statement of interest U.S. "explicitly disclaimed a desire to be a party"); *Tyler v. Smith*, 472 F. Supp. 2d 818, 820 (M.D. La. 2006) (noting U.S. declined to intervene but filed a statement of interest pursuant to 28 U.S.C. § 517); *cf. Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 22 F. Supp. 2d 521, 526 (E.D. Va. 1998) (rejecting U.S. attempt to intervene pursuant to 28 U.S.C. § 517 and holding that "the proper way for the United States to assert its interest is through an *amicus* brief or a statement of interest on its own behalf").

Trial courts routinely accept and consider statements of interest submitted by the United States under such circumstances. These statements often prove useful to the court's understanding of specific issues that may be integral to their decision, even in cases where the United States is not a party. *See, e.g.,* Exhibits A, B; *ABC Charters, Inc. v. Bronson*, 2009 WL

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1 1010435, *4-5 (S.D. Fla. Apr 14, 2009) (adopting and incorporating by reference U.S. position
 2 as set forth in its statement of interest); *Samuel C. Johnson 1988 Trust*, 2009 WL 1850646
 3 (finding, after consideration of statement of interest, that U.S. retained reversionary interest in
 4 right of way over plaintiffs' properties); *Gonzalez Paredes v. Villa*, 479 F. Supp. 2d 187, 193
 5 (D.D.C. 2007) (noting U.S. statement of interest entitled to "great deference"); *see also*
 6 *Northern Mich. Hospitals*, 2008 WL 2233964 at *5 (citing U.S. statement of interest); *Welxum*,
 7 568 F. Supp. 2d at 38-39 (same); *S.E.C. v. Nacchio*, 2008 WL 2756941, *2 (D. Colo. July 14,
 8 2008) (same); *Tyler*, 472 F. Supp. 2d at 822, 824, 826, 827, 829 (same); *eSpeed, Inc. v.*
 9 *Brokertec USA, L.L.C.*, 2004 WL 62490, *1, *3 (D. Del. Jan. 14, 2004) (same); *United for*
 10 *Peace and Justice v. City of New York*, 243 F. Supp. 2d 19, 21 & n.3 (S.D.N.Y. 2003) (same).

11 The United States submits that the present case warrants a statement of its interest but not
 12 intervention. Nor is it aware of any California authority that indicates it is precluded from
 13 following this course in California trial court. In fact, as it has already demonstrated, there is
 14 precedent to the contrary. *See Exhibits A, B; cf. Jersey Mald Milk Prods. Co., Inc. v. A.A.*
 15 *Brock*, 13 Cal. 2d 661, 665 (1939) (noting that where proposed intervenors did not have
 16 sufficiently direct interest in litigation, they were permitted to file briefs as *amici curiae*).
 17 Accordingly, the United States respectfully requests that the Court consider the Statement set
 18 forth below.

19
 20 **II. California is Responsible for Prompt and Accurate Disability Determinations**
 21 **Under the Social Security Act, and May Not Retain Unused Disability**
 22 **Determination Funds for Any Other Purpose.**

23 The payment of disability insurance and SSI benefits is governed by Titles II and XVI of
 24 the Social Security Act and the regulations implementing the statute. Title II provides disability
 25 insurance benefits to persons who have contributed to the program and are disabled as defined
 26 by the Act, while Title XVI provides SSI benefits to persons with limited income and resources
 27 who are aged, blind or disabled as defined by the Act. *See* 42 U.S.C. §§ 401-434, 1381-1383f.
 28 Under Section 221(a) of the Act, the determination of whether or not an individual is disabled
 under the Act, the date the individual's disability began, and the date on which the individual's

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1 disability ceases "shall be made by a State agency...in any State that notifies the Commissioner
2 of Social Security in writing that it wishes to make" these disability determinations. 42 U.S.C. §
3 421; *see also* 20 C.F.R. §§ 404.1601 *et seq.*, 416.1001 *et seq.*

4 Under this framework, the state and federal governments each bear specific legal
5 obligations to ensure efficient, effective processing of disability and SSI claims. The statute
6 authorizes the Commissioner of Social Security to set regulatory and other standards for
7 administration of the program and to monitor the state's compliance with these standards. *See*
8 *generally* 42 U.S.C. § 421, 20 C.F.R. §§ 404.1603(b), 416.1003(b). In addition, the Social
9 Security Administration (SSA) provides federal funds to the state to defray all necessary costs of
10 making disability determinations. *See* 42 U.S.C. § 421(c); 20 C.F.R. §§ 404.1603(b)(3),
11 404.1626(a), 416.1003(b)(3), 416.1026(a). All such funding must be used for that purpose
12 alone, and any money that is *not* so used must be returned to the United States. 42 U.S.C. §
13 421(f); *see also* 20 C.F.R. §§ 404.1626(f), 416.1026(f); *Ditto v. Sternberger*, 145 Md. App. 469,
14 492-93 (2002) ("[F]ederal funds paid to the state that are earmarked for social security disability
15 benefits payments may be used only for disability benefits payments. Any excess of funds after
16 distribution of payments are to be returned to the United States Treasury.").

17 The states, for their part, are "responsible for making *accurate and prompt* disability
18 determinations," and to that end are required to provide "the organizational structure, qualified
19 personnel, medical consultant services, and a quality assurance function *sufficient to ensure that*
20 *disability determinations are made accurately and promptly.*" 20 C.F.R. §§ 404.1620(a) & (b),
21 416.1620(a) & (b) (emphasis added); *see also* 20 C.F.R. §§ 404.1603(c)(1) & (2),
22 416.1003(c)(1) & (2). Additionally, a state must, "to the best of its ability, facilitate the
23 processing of disability claims by avoiding personnel freezes, restrictions against overtime
24 work, or curtailment of facilities or activities." 20 C.F.R. §§ 404.1621(d), 416.1021(d).

25 In short, in making evaluations of a disability under the Act, the state is acting on behalf
26 of the federal government. As such, it must follow the applicable standards established by the
27 federal government. *See* S. Rep. No. 408, 96th Cong., 1st Sess. 55 (1979) (noting that purpose
28 of 1980 Disability Amendments was to "strengthen Federal management" of the program by

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1 giving federal government "the authority to establish, through regulations, the procedures and
2 performance standards for the State disability determination procedures...States would have the
3 option of administering the program in compliance with these standards or turning
4 administration over to the Federal Government."). California, having elected to participate in
5 the federal disability benefits program, must comply with the mandatory requirements
6 established by Congress set forth in the Act and with the federal regulations duly promulgated
7 thereunder. *Id.*

8
9
10 **III. The Furloughs Are Inconsistent with California's Obligations Under the Social Security Act.**

11 In the past year, with the worsening national economic crisis, there has been a substantial
12 increase in applicants for federal disability and SSI benefits. Yet fewer California claims are
13 processed for each furlough day that is applied to the DDSD employees under the Governor's
14 Executive Orders, leading to increased delays in the payment of claims to California citizens
15 who need the assistance these benefits provide. The furloughs have also only exacerbated the
16 backlog of disability claims, which SSA has prioritized reducing and eventually eliminating in
17 anticipation of the rise in claims to follow the aging and retirement of the "baby boom"
18 generation. Moreover, the furloughs undercut the intent of the American Recovery and
19 Reinvestment Act of 2009, Pub. L. 111-5, Div. A, Title VIII, which specifically directed a part
20 of its federal stimulus package to support disability claims processing in an effort to reduce the
21 backlogs and assist disabled Americans in the current difficult economic climate.

22 These negative effects demonstrate that, in implementing the Executive Orders at issue in
23 this case, California is failing to meet its obligations under the Social Security Act. See Section
24 I, *supra*. The mandatory furloughs undermine California's ability to make prompt and accurate
25 disability determinations under the relevant federal regulations, and run directly counter to its
26 responsibility to "facilitate the processing of disability claims by avoiding ... restrictions against
27 overtime work, or curtailment of facilities or activities." See *Id.* It is unavailing for Defendants
28 to argue that California is fulfilling these responsibilities to the best of its ability, given the total

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2 performance standards for the State disability determination procedures...States would have the
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1 lack of rational justification for its application of the furloughs to DDSD employees who are *not*
2 being paid out of state funds but who for no other discernible reason are being impeded from
3 carrying out their duties. Furthermore, the Court should give substantial deference to the SSA
4 regarding the proper construction of its own regulations. *Thomas Jefferson Univ. v. Shalala*,
5 512 U.S. 504, 512 (1994) ("Our task is not to decide which among several competing
6 interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be
7 given "controlling weight unless it is plainly erroneous or inconsistent with the regulation").
8 See also *RCJ Med. Svcs., Inc. v. Bonta*, 91 Cal. App. 4th 986, 1010-11 (2001) (applying *Thomas*
9 *Jefferson* standard to find federal Health Care Financing Administration's construction of its
10 own regulation regarding delegation of responsibilities by state Medicaid agency was entitled to
11 deference); *Dep't of Health & Human Svcs. of State of Washington v. Chater*, 163 F.3d 1129,
12 1133-35 (9th Cir. 1998) (Social Security Commissioner's interpretation of regulation as
13 precluding SSI benefits to juveniles in privately owned group homes was entitled to deference).
14

15 **IV: This Case is Distinguishable From the Other Furlough Cases Before This Court and**
16 **Others Because the Furloughs Are Not Related to the Needs of the DDSD.**

17 While the United States takes no position on the pure state law issues raised by the
18 Petition, it notes that to the extent Defendants rely on the opinions of Judge Patrick Marlette
19 denying certain writ petitions that were filed earlier this year in Sacramento County Superior
20 Court, those cases are clearly distinguishable.² Although Judge Marlette rejected these earlier
21 challenges to the Order on the grounds that the Governor had statutory authority to reduce the
22 hours of state employees pursuant to Sections §§ 19851 and 19849 of the California
23 Government Code, this conclusion was based on his reasoning that

24 ² Three of these suits—*Professional Engineers in Cal. Gov't et al. v. Schwarzenegger* (Case No. 34-
25 2008-80000126) (hereinafter *PECG*), *Cal. Attys., Admin. Law Judges & Hearing Officers in State*
26 *Employment v. Schwarzenegger* (Case No. 2009-80000134), and *Service Employees Int'l Union, Local*
27 *1000 v. Schwarzenegger* (Case No. 2009-80000135)—were filed in close succession in early January in
28 the Sacramento County Superior Court, were stipulated as being related, and accordingly were heard and
decided together by Judge Marlette. A fourth case, *Cal. Correctional Peace Officers' Ass'n v.*
Schwarzenegger (Case No. 34-2009-80000137), which was filed slightly later, was also heard and
decided by Judge Marlette in early February.

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1 [u]nder the circumstances of the current fiscal crisis, the reduction in the workweek of
2 state employees under the furlough order is *indisputably related* to the needs of the
3 various state agencies, which, from the evidence respondents have submitted to the
4 Court, run the imminent risk of running out of money and thus being unable to carry out
5 their missions, if immediate action is not taken to reduce expenditures.

6 January 30, 2009 Order at 7; February 5, 2009 Order at 5-6 (emphasis added).

7 No such justification exists here. Imposing furloughs on specially funded employees like
8 the DDSD employees is not reasonably, let alone indisputably, related to the needs of the
9 defendant agencies, since the money used to administer the DDSD is not part of the state
10 General Fund.³ Nor is the DDSD in any imminent danger of running out of money, given that
11 it is fully federally funded. Indeed, the only threat that is preventing the DDSD from carrying
12 out its mission is not lack of funding but the state's unauthorized imposition of furloughs on
13 employees who fulfill a federal function. Furloughing DDSD employees only impedes SSA's
14 ability to provide critically needed federal benefits to some of the most vulnerable members of
15 California society. Given that the furloughs do nothing to alleviate the State's fiscal problems,
16 there is simply no reason to enforce them with respect to DDSD employees.

17 CONCLUSION

18 For the foregoing reasons, the United States respectfully requests that the Court grant
19 UAPD's Verified Petition.

20 Dated: October 15, 2009

Respectfully submitted,

21 TONY WEST
22 Assistant Attorney General

23 JOSEPH P. RUSSONIELLO
24 United States Attorney

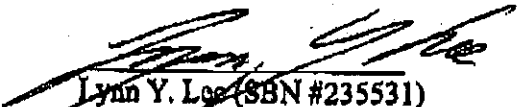
25
26 ³ A similar point was apparently raised at oral argument in the *PECG* case, where the petitioners argued
27 that many of their members were employed by special fund agencies and that the Executive Order, being
28 targeted at the General Fund deficit, was thus not reasonably related to the needs of those agencies.
However, Judge Marlette declined to rule on this issue because it was not raised in any of the petitions
and no evidence had been submitted to support it. 1/30/09 Order at 9 n.10.

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10 **SUPERIOR COURT OF CALIFORNIA**
 11 **COUNTY OF ALAMEDA**

12 SERVICE EMPLOYEES INTERNATIONAL
 13 UNION, LOCAL 1000, and YVONNE
 14 WALKER, a taxpayer,

15 Petitioners/Plaintiffs,

16 vs.

17 ARNOLD SCHWARZENEGGER as Governor
 18 of the State of California; JOHN CHIANG,
 19 Controller of the State of California; STEVE
 20 POIZNER, Insurance Commissioner of the State
 21 of California EDMUND G. BROWN, Jr.,
 22 Attorney General of the State of California;
 23 DAVID GILL as Director of the Department of
 24 Personnel Administration; et al, and Does 1- 100.

25 Defendants/Respondent,
 26 Defendants/Respondents.

CASE NO. RGO9456750

DECLARATION OF PETER D.
 SPENCER SUBMITTED BY
 PETITIONER

Judge: Hon. Frank Roesch
 Date: November 16, 2009
 Time: 9:00 am
 Dept: 31

27 I, Peter D. Spencer, declare as follows:

28 1. I am Regional Commissioner for the Social Security Administration ("SSA") for
 Region IX, which includes California, Nevada, Arizona, Hawaii, Guam, American Samoa, and
 the Commonwealth of the Northern Mariana Islands.

DECLARATION OF PETER D. SPENCER IN SUPPORT OF PETITIONER'S MEMORANDUM OF POINTS AND
 AUTHORITIES
 Case No. RGO9456750

2. I am very familiar with how the California Department of Social Services, Disability Determination Services Division ("DDSD") handles disability determinations for SSA's Social Security Disability Insurance and Supplemental Security Income programs. The determinations made by the DDSD include ones that involve initial benefit claims, reconsiderations of claims (appeals of initial determinations), and continuing disability reviews ("CDRs") (medical reviews of those who were previously awarded benefits).

3. I have reviewed Section D of the Statement of Facts in Respondents' Memorandum of Points and Authorities in Opposition to Petitioner's Request for Writ of Mandate ("Respondents' UAPD Memorandum") in *Union of American Physicians and Dentists v. Schwarzenegger*, No. RG09456684, filed on November 2, 2009. In addition, I have reviewed the Declaration of Joe Carlin in Support of Opposition to UAPD's Request for Writ of Mandate, dated October 28, 2009 ("Carlin Decl.") and the Declaration of Robert Stavis in Opposition to Petitioner's Writ of Mandate in the instant case.

Continuing Disability Review Targets

4. In the UAPD case, Respondents state that, "[a]s of September 30, 2009 (the end of the federal fiscal year), the DDSD had processed 22,947 [continuing disability] reviews (only 18 reviews short of complete compliance with our target)." Respondents' UAPD Memorandum, at 7 (citing Carlin Decl. ¶ 9). Mr. Carlin's statement provides the figure for the reduced CDR target but not the original, pre-furlough target.

5. The DDSD began federal fiscal year 2009 with a target of processing approximately 32,000 CDRs. After the State implemented the furlough days in February 2009, the DDSD requested that SSA reduce its processing target by 9,000 CDRs so it could give priority to meeting its target for initial disability determinations. CDRs are mandated by section 221(i) of the Social Security Act, 42 U.S.C. § 421(i), and the implementing regulations at 20 C.F.R. §§ 404.1589, 404.1590, 416.989, 416.990 (2009). In order to ensure that the California CDRs were completed, SSA shifted to other SSA regions the processing of the additional 9,000 CDRs originally included in the DDSD's processing target.

Case Processing Impacts

1 6. Processing Times: Respondents' statement that "the DDSD continues to process
2 claims in a time better than the national average" is misleading. Respondents' UAPD
3 Memorandum, at 7 (citing Carlin Decl. ¶ 7). While it is true that, as of September 30, 2009, the
4 DDSD's average processing time for *initial* disability determinations was lower than the
5 national average, this is only one aspect of DDSD's workload. I am concerned that the ability of
6 DDSD to handle *all* aspects of its Social Security workload is rapidly deteriorating. For
7 instance, DDSD is also responsible for processing reconsiderations of initial disability
8 determinations. From September 30, 2008, to October 2009, the national average processing
9 time for reconsiderations increased by 3.1 %, or 2.5 days, from 73.3 days to 75.8 days. In
10 California, over the same period, the DDSD average processing time for reconsiderations
11 increased by 22.3%, or 13.6 days, from 60.9 days to 74.5 days. Also, SSA estimates that 1,476
12 fewer California cases are processed for each furlough day that is applied to the DDSD
13 employees, and that the furloughs delay the payment of claims to California citizens who need
14 the assistance SSA benefits provide at an average rate of over \$420,800 per day.

15 7. "Pooled" Cases, or Developmental Units: Prior to the furloughs, the DDSD assigned
16 all initial claim and reconsideration cases to line-unit examiners within 24-48 hours. In
17 July 2009, DDSD established Development Units and uses these units to assign cases to a
18 "pool," rather than a specific examiner, to initiate case development. These cases are assigned
19 to a specific examiner after 30 days in the pooled unit. The volume of cases in the
20 developmental pool since July 2009 has averaged 3,000 to 5,000 pending cases for any given
21 week. Such a process requires extra administrative handling, involves multiple examiners in a
22 single case, and creates inefficient hand-offs that do not exist with direct case assignment.
23 These additional steps have the net effect of increasing processing time on these cases.

24 8. "Staged" or Backlogged Cases: Prior to the furloughs, the DDSD assigned all cases to
25 line-unit examiners within 24-48 hours. In September 2009, the DDSD began "staging" initial
26 claims and reconsiderations. "Staged cases" are, in essence, a backlog, as these cases are simply
27 set aside with *no* development initiated until some later point when they can be assigned. These
28 staged cases will eventually cause a significant degradation in processing time. With the

1 are projected to be approximately 8% more than can be processed with available funding. As a
2 result, the number of pending claims is expected to increase in all state disability determination
3 services. However, SSA has a national multi-year strategy to reduce the number of pending
4 claims to an optimal level by 2013. Respondents' continued application of the furloughs to the
5 federally-funded DDSD will impede its ability to process claims timely and efficiently. If
6 DDSD employees have less production time, they will process less work.

7
8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct. Executed on this 9th day of November, 2009, in Richmond,
10 California.

11
12 
13 PETER D. SPENCER
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